

MINUTES

MONTANA SENATE 56th LEGISLATURE - REGULAR SESSION FREE CONFERENCE COMMITTEE ON SB 499

Call to Order: By **CHAIRMAN LORENTS GROSFIELD**, on April 13, 1999
at 11:26 A.M., in Room 325 Capitol.

ROLL CALL

Members Present:

Sen. Lorents Grosfield, Chairman (R)
Sen. Bea McCarthy (D)
Rep. Karl Ohs (R)
Rep. Bill Eggers (D)
Rep. Bill Tash (R)

Members Excused: Sen. Mack Cole (R)

Members Absent: None.

Staff Present: Gilda Clancy, Committee Secretary
Larry Mitchell, Legislative Services Division

Please Note: These are summary minutes. Testimony and
discussion are paraphrased and condensed.

Committee Business Summary:

Free Conference Committee Hearing SB 499

Discussion:

CHAIRMAN GROSFIELD explained the amendments on SB 499 were
rejected in the Senate based upon several issues. A new set of
amendments were handed out **EXHIBIT (frs80sb0499a01)**. These
amendments were not edited.

Larry Mitchell, Legislative Services Division, explained the
amendments.

CHAIRMAN GROSFIELD remarked there are several different issues in
the amendments and thought each should be discussed. They began
with amendment number seven.

Larry Mitchell stated this amendment regards the discharge of ambient ground water.

Curt Chisholm, Deputy Director, Department of Environment Quality (DEQ), informed the Committee before talking about the amendment number seven, he needed to point out this amendment does not reflect what was intended by those who want to reinstate the permit exclusion, because this both reinstates the permit exclusion and exclusion from non-degradation and that is the show-stop for the Environmental Protection Agency(EPA).

So assuming that the intent of the amendment was simply to exclude the discharges of unaltered ground water from permit exclusions, the director of DEQ has spoken to Max Dodson from EPA yesterday and Mr. Dodson expressed a lot of anguish about this kind of a permit exclusion.

This is not a standards issue, it is a permit issue and EPA cannot disapprove a state statute, which is not a water quality standard. The State at one time was arguing that a point source discharge which does not contain pollution does not need a permit. EPA is more strongly, than ever, arguing any point discharge, whether or not it contains pollution does require a permit. That is the only way to ensure that discharge does not contain pollution. If it does, the pollution is controlled and also what it does to the surface water.

Based on that, **DEQ Director, Mark Simonich**, who was not present at this meeting, asked **Mr. Chisholm** to express to the Committee not to re-instate this permit exclusion back into the law, simply because he feels in the long run it will be a source of contention with EPA and we will be arguing over it for months if not years. It would be better left out of this particular clarification with EPA to get our water quality standards in the position they can be approved by EPA. Also, we do not gain anything in the long run by excluding discharges which are currently exempt by this provision of law.

CHAIRMAN GROSFIELD alleged this refers to any kind of a discharge for any purpose. So we are talking about well tests as well.

Mr. Chisholm remarked that is correct. Any discharge of unaltered ground water, this whole issue refers to a permanent exclusion from that.

CHAIRMAN GROSFIELD related it seems to him there is a lot of relatively minor activities which go on that if a permit is required in each case, a burden is being placed on people. For example, if someone wants a domestic well behind their house and

the driller drills and finally finds a little bit of water and does a quick test to see how many gallons are there, he might dump 100 gallons on the ground which is a one-time deal. Without an exclusion this person is going to have to come in before he drills the well or probably not until he finds some water, then he will have to delay his project.

It seems to **CHAIRMAN GROSFIELD** there is a lot of those kinds of examples. Another could be putting in drain tile around a foundation to keep water away from the foundation of a house or to keep it out of a basement. Now they are going to need a non-degradation permit? It seems to him that is going a little overboard.

Mr. Chisholm replied when this issue first came up and the question was raised about whether or not a discharge permit was needed for those kinds of occurrences, they were all covered by this provision of law which was put into law in 1995. Apparently, there are ways to deal with those which is not too onerous. They can get general permits and people still have to get permits for foundation drains.

He thought **Mr. Simonich's** position in this, is he does not EPA hassling DEQ over this thing. It would be easier just to forget these kinds of discharges. It would increase the department's workload and some of these sources would be vulnerable to having to go to DEQ for discharge permits. They certainly wouldn't be a priority with the department and the department, at times, would use some discretion as to whether or not some of these discharges would require a permit in the first place. Admittedly, some of this things would be open to challenge by whomever would like to challenge it without this exclusion.

CHAIRMAN GROSFIELD asked **Steve Pilcher** to respond to this issue.

Steve Pilcher, TVX Mineral Hill Mining and Stillwater Mining, remarked he would like to provide additional information that should help understand the need for the provisions that are being discussed. First of all, you have to keep in mind a regulatory permit program should be used to deal with potential problems. It is to deal with pollutants which are being discharged and have the potential of causing problems in a stream. A permit program should not be used just to be a burden on those people who are not causing a problem. It is really that simple.

Regarding the fact the EPA is saying they don't think they like what we are doing here, it is easy for Max Dodson or Bill Yellowtail to sit in Denver and tell them they don't want this

done. He mentioned the letter of December 24, which disapproved standards.

Mr. Pilcher recounted that **Deputy Director Chisholm** mentioned this wasn't as much a standards issue, but the only thing EPA mentioned they want out of the current Water Quality Act in this particular section, was the phrase which states, "and is not degradation". To delete that phrase is consistent with some of the other changes in SB 499. In that letter EPA did not say, "and you have to delete the section which excludes the discharge of unaltered ground water from the permit requirements". Historically, there have been a number of unaltered discharges to ground water which have taken place throughout the State of Montana. They have foundation drains to protect the foundation, they have field tile drains to lower existing ground water to allow proper plumbing and other activities, and this could be stretched so far as to say flow-through spring tanks for livestock watering are an unaltered source of ground water, which in many cases eventually find their way to surface water.

Should a permit regulatory program be applied to all those discharges? Maybe this is not a resource issue, but there may be someone who will say there is no provision in the law that protects that from happening. Historically, the policy of the Department of Health and Environmental Sciences and subsequently, the Department of Environmental Quality, was to allow those practices. The provisions were added in 1995 legitimized that particular policy and practice. There was discussion where the original proposal was if a person was doing nothing to ground water but dumping it into a stream, they were free to do whatever they wanted.

When they decided they didn't want 'skunky' ground water in a stream and causing serious pollution problems, is why the language as exists today in the Water Quality Act. So there is a safety net to ensure somebody doesn't just pump it out and trash the stream. In those cases where you are merely taking ground water out of a location, do nothing to it but it goes into a pipe and directly into surface waters, as long as those qualifications are met, why should we burden that segment of the community with a regulatory program?

Jeff Barber, Environmental Information Center, expressed he realizes **Mr. Pilcher's** stand on foundations and other things but they saw this as a provision to allow the Blackfoot Mine to drain the aquifer up at their site that had arsenic in it. Under previous standards in 1995, **Mr. Barber** saw it as a way to de-water the aquifer and go ahead with their proposal.

Regarding the stock water tank, **Mr. Barber** said he didn't really know and hadn't thought about it enough.

REP. OHS mentioned the irrigation wells. Irrigation wells could very easily get into ground water.

Mr. Barber responded this is a pretty open-ended provision with the way the language is right now.

REP. EGGERS asked if **Mr. Barber** knew of any process within the department as it exists right now whereby some rules could be adopted to result in a permit waiver for some of these consequences as **SEN. GROSFIELD** has requested.

Mr. Barber responded he isn't aware of any, but would have to ask the department.

REP. TASH stated regarding **REP. OHS'** statement about a strict interpretation, this could even include irrigating your lawn.

Mr. Barber answered, "absolutely". What he is trying to say is he does not agree with that strict interpretation.

CHAIRMAN GROSFIELD asked **Mr. Chisholm** if he had any comments on this subject. How can we exclude some of these situations?

Mr. Chisholm responded he thinks the department will have some discretion in requiring permits for some of these discharges. He believes they were caught by surprise not realizing that stock watering tanks and foundation drains, also construction de-watering, had been covered by this provision of unaltered ground water based what was put into law in 1995. The department has some discretion in not requiring permits and in some cases, certainly they would have enforcement discretion for some of these things.

CHAIRMAN GROSFIELD voiced from heads nodding on this Committee, he believes the Committee would like to see some kind of middle ground. He asked the people to work together to come up with something next meeting.

He then referred to the implications of the savings clause with respect to these things talked about. The savings clause as it is presented in amendment 10, subsection 2, under 'A'.

Larry Mitchell conveyed subsection 2 addresses those things which were once considered non-significant. These amendments came over to him this morning, and drafting them in a hurry, he has made an error on amendment number seven. On page 6, amendment 7 there is

a very key provision. At the end of the first sentence, the words "and is not degradation", those words are not part of this amendment.

Mr. Mitchell said the issue **Mr. Chisholm** is trying to relate is the permit provision and the non-degradation issue are two separate things. The amendment does not include these words.

CHAIRMAN GROSFIELD opened discussion for groundwater definition, which is number 5 on page 2.

Mr. Chisholm explained this definition is the expulsion of groundwater from the definition of high quality waters. In this particular issue, there is some benefit to the department to have that definition in there.

He said **Mr. Simonich's** position on this is he wanted to caution this Committee from putting that exemption from the definition of high quality waters in at this particular juncture of the legislative history of this bill. He said that would place a provision or exclusion from the definition of high quality waters which wasn't subject to public debate and he didn't want to put the governor in a position of compromising by that kind of exclusion, at this point in time, in this particular bill. This definition has nothing to do with the reason this bill existed in the first place, that is to correct any problems DEQ had with the EPA on water quality standards. This is simply a vehicle to get a definition in there which will be an advantage to the department when making subdivision decisions. There are people in Eastern Montana who had a fit about a similar attempt on the part of the department to not have to worry about that type of aquifer to the department's rule-making. They even brought 'batman' in to kick DEQ around at a meeting of the Board of Environmental review. That is **Mr. Simonich's** message to the Committee on that particular issue.

CHAIRMAN GROSFIELD referred to amendment 10. He asked **Mr. Chisholm** in the past five years, activities relative to things like constructing or repairing a head gate, without having a savings clause, are we affecting those activities? What is the section of limitations on this?

Mr. Chisholm responded they were not concerned about this, either through litigation or through the EPA's enforcement. Anybody would be called to task for activities which were clearly permitted by law up to the time the EPA said they couldn't approve the standards and they would have to be fixed.

CHAIRMAN GROSFIELD asked if that was the letter of December 24, 1998.

Mr. Chisholm answered the plaintiffs are arguing they want to go back and challenge that, at least in terms of what the department intends to do. He did not think construction activities under short term authorizations would be subject to anything the DEQ does. There is approximately 150 short-term authorizations granted by DEQ for construction activities which have not yet taken place. Without a savings clause, those people would have to comply with the new provisions of this bill, whatever effective date this bill goes into effect. This would mean the provision would have to be changed under which they could carry out their construction activities and DEQ would do that. They would simply notify them and call and tell them DEQ would have to issue them a permit now, because that is what EPA requires in place of short-term authorizations. That could be done by the department without a lot of agony of the holdings of authorizations for short-term construction projects.

CHAIRMAN GROSFIELD asked if the short-term construction projects were all 310 permits?

Mr. Chisholm responded he did not know.

CHAIRMAN GROSFIELD asked what the agency permit was.

Mr. Chisholm answered they have 310 permits for private people and agency permits are 124.

CHAIRMAN GROSFIELD asked if they were all either 310 or 124.

Mr. Chisholm answered 'yes'.

CHAIRMAN GROSFIELD asked **Mr. Pilcher** if he would like to respond to this issue.

Mr. Pilcher responded they struggled a long time with some of the language to deal with EPA's concern over the short-term authorizations. They felt very strongly it was a program which acknowledged legitimate, necessary activities that would have some adverse impact on water quality. Through either 124, 310 or subsequently the 3A authorization, if in fact, there is likely to be some significant impact, they were adequately controlling that.

He thinks the language accepted in House Natural Resources Committee takes care of that problem, but it is a fairness issue. A lot of people acted in good faith in accordance with the Water

Quality Act provisions which were in effect at the time. Whether it be the short-term authorizations or decisions the agency made under the other provisions which are identified in Section 2 of this applicability provision, in fairness we owe them some protection. The TVX Mine has exploration activity and drilling, they encounter water, and they capture that water before it is contaminated by any blasting material or anything else, and they can then discharge that water. Once you begin that discharge, it continues. Now, without an applicability provision, somebody is likely to come back and say now we need a permit.

There are other examples where people have acted in good faith, they are discharging water which is not causing a problem, but suddenly we expose them to the possibility of a third party. **Mr. Chisholm** has talked about the discretion and **Mr. Pilcher** is concerned about that because he doesn't think the agency has had as much discretion as the third parties which are coming in and reminding the agencies that there is no provision that this can discharge without a permit, so you've got to require a permit. He thinks we should provide protection for those people who did what was appropriate and necessary at the time of action and they are continuing to abide and act in good faith.

CHAIRMAN GROSFIELD asked other than the 150 pending construction projects, how many other permits might this affect?

Mr. Chisholm answered the 150 pending projects under the short-term authorizations were extreme for construction. Relative to discharges of surface water from non-degradation review, he can think of three examples. There is discharge of surface water at the TVX Mine, there is the Stillwater Mine at Gardiner, and there are about 11 wells owned by Redstone Gas Company who is using a de-watering technique in order to extract methane gas from coal fields. That's all they know of that would be affected by a non-savings clause for non-degradation review.

CHAIRMAN GROSFIELD asked **Mr. Barber** to testify on this subject.

Mr. Barber stated they are involved in a lawsuit over these provisions so he is not sure what the impact of this is.

REP. OHS thought overall, the Committee had other issues to consider and they should do that and then come back.

CHAIRMAN GROSFIELD asked what **REP. OHS** thought of exempting the current construction permits.

REP. OHS responded he thought that is what we need to do.

REP. MCCARTHY asserted she thought it is only fair to the people who have asked for those permits. They did it in good faith.

CHAIRMAN GROSFIELD asked what about methane gas or the TVX Mine or the Redstone Gas? He asked **Mr. Chisholm** give a short summary of the methane gas issue.

Mr. Chisholm claimed the Redstone Gas Company is excluded from requiring a permit. They want a water discharge permit from the State just to be sure they are not discharging water against EPA standards.

CHAIRMAN GROSFIELD alleged, then they are willing to get a permit anyway.

Mr. Chisholm responded they are. But the non-degradation exemption is gone and so they will have to go through non-degradation review. *{Tape : 1; Side : B; Approx. Time Counter : 42 - 49}* He thinks there will be many, many more wells requesting permits in the eastern part of the State for this type of activity.

CHAIRMAN GROSFIELD asked how many more wells is that?

Mr. Chisholm responded probably in the thousand range. He said **Mr. Simonich** also wanted him to express his position on all three of these issues. Regarding the savings clauses, **Max Dodson** insisted this was a 'show stopper' as far as EPA is concerned.

Mr. Chisholm explained he is not exactly sure what EPA could or would do about short-term exemptions if there was a savings clause for people who already have an authorization to conduct construction activities. Hopefully, those construction activities can be completed at the end of the construction season. He thinks what EPA is primarily concerned about are the long-term exemptions or the long-term savings clauses for the TVX discharge. The data is exempted from this point forward but it can be discharged for perpetuity and they are exempted from what took place before the law was changed. He believes that is where EPA would draw the line and create a considerable problem for the department.

REP. TASH asked what the position of the department would be as far as the saving clause time wise to deal with these non-degradation issues and permits on the methane gas development.

Mr. Chisholm answered in terms of workload and how long it would take to get permits out, he asked **Jan Sensibaugh, Administrator, DEQ**, to respond.

Ms. Sensibaugh responded there are so many unknowns about the quality of water and what the receding water is, etc. They are working one to two months to get normal, non-controversial permits out the door. They are trying to do as much general permitting as possible, where they do the permit once, put it out for public review and do authorizations for discharge under the general permit for each individual activity which came in.

CHAIRMAN GROSFIELD asked if their general permitting authority is clear in statute.

Ms. Sensibaugh answered, "yes, it is".

CHAIRMAN GROSFIELD inquired what the cost is.

Ms. Sensibaugh stated the application cost depends upon the quality of water and the points source discharge up to \$2500 for point source discharge. There would be an ongoing fee of \$200 per year to hold the permit.

CHAIRMAN GROSFIELD asserted thinking about the flow-through stock water tanks at \$200 per year, he doesn't think this is right.

Mr. Pilcher added, in regard to the Redstone Gas situation and the coal bed methane gas, currently they are discharging from the 11 wells under the provisions of the Water Quality Act as it now exists. It states they can do so without causing a permit. They are, as has been mentioned, proceeding to obtain a permit for two reasons. One is given the potential future activity, they know that EPA is going to be looking at it and instead of getting into a battle with them, they will probably go ahead and seek a permit. Secondly, one of the reasons is there are times of the year, because of existing quality of groundwater, they might not meet the qualifiers associated with the ability to discharge without a permit. There are times of the year when they could violate surface water quality standards and they wouldn't be allowed this permit exemption.

In the case of the TVX ongoing discharge, they would continue forever maybe, but it is not the discharge of pollutants, it is discharging ground water which is not causing problems in the surface water receiving stream. He wanted to make that distinction in the case of the Redstone Gas Partner's Distributing.

CHAIRMAN GROSFIELD asked the Committee to meet again at 8:30 a.m. the next day.

ADJOURNMENT

Adjournment: 12:15 P.M.

SEN. LORENTS GROSFIELD, Chairman

Gilda Clancy, Secretary

LG/GC